Supreme Court, U.S.
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IN THE

Supreme Court of the United States

ALAN D. BOLINGER, JR.,

Petitioner,

v.

THOMAS RIDGE, Individually and in his capacity as Governor of the Commonwealth of Pennsylvania; GARY CROWELL, Individually and in his official capacity as Secretary of the Department of General Services of the Commonwealth of Pennsylvania; JOHN R. McCARTY, Individually and in his official capacity as Deputy Secretary for the Administration of the Department of General Services of the Commonwealth of Pennsylvania; GREGORY C. SANTORO, Individually and in his official capacity as Chief Counsel for the Department of General Services of the Commonwealth of Pennsylvania; GREGORY A. GREEN, Individually and in his official capacity as Director of the Bureau of Personnel for the Department of General Services of the Commonwealth of Pennsylvania; THOMAS G. PAESE, Individually and in his official capacity as the Secretary of Administration of the Commonwealth of Pennsylvania; PAUL A. TUFANO, Individually and in his official capacity as General Counsel of the Commonwealth of Pennsylvania,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

GARY M. LIGHTMAN
Counsel of Record
ERIC C. STOLTENBERG
LIGHTMAN & WELBY
Attorneys for Petitioner
2705 North Front Street
Harrisburg, PA 17110
(717) 234-0111

57pp

QUESTION PRESENTED

Whether Petitioner, Alan D. Bolinger, Jr., a police officer employed by the Commonwealth of Pennsylvania, and subject to discipline only for just cause, was denied due process of law when Respondents, Gary Crowell and John R. McCarty, terminated his employment without first providing Bolinger with a statement of the charges against him, an explanation of the employer's evidence and an opportunity to respond to said charges.

LIST OF PARTIES

Petitioner is Alan D. Bolinger, Jr., a Capitol Police Officer employed by the Commonwealth of Pennsylvania, Department of General Services.

Respondents are Gary Crowell, Individually and as Secretary for the Department of General Services of the Commonwealth of Pennsylvania, and John R. McCarty, Individually and as Deputy Secretary for the Administration of the Department of General Services, Commonwealth of Pennsylvania. All other Respondents set forth in the caption have been excluded by initial order of the District Court.

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The Opinion of the United States Court of Appeals for the Third Circuit is unreported. *Bolinger v. Ridge, et al.*, No. 98-7194 (3d Cir. filed March 9, 1999) (App. A). The Opinions of the United States District Court for the Middle District of Pennsylvania are unreported. *Bolinger v. Ridge, et al.*, No. 1:CV-97-1342 (M.D. Pa. filed March 2, 1998) (App. C); *Bolinger v. Ridge, et al.*, No. 1:CV-97-1342 (M.D. Pa. filed November 14, 1997) (App. E).

STATEMENT OF JURISDICTION

The Court of Appeals entered its judgment on March 9, 1999. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution, Section 1, which provides as follows:

> **Section 1. Citizens of the United States**
>
> All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

STATUTORY PROVISION INVOLVED

The statute authorizing a civil action for the deprivation of protected rights, which provides as follows:

> **§ 1983. Civil Action for Deprivation of Rights.**
>
> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 U.S.C. § 1983.

STATEMENT OF THE CASE

Petitioner Bolinger was hired by the Commonwealth of Pennsylvania as a Capitol Police Officer on or about January 31, 1986. The hiring was pursuant to and subject to the provisions of the Pennsylvania Civil Service Act, Act of August 5, 1941, P.L. 752, *as amended*, 71 P.S. §§ 741.1-741.1005. On or about August 1, 1985, Bolinger became a member of the Fraternal Order of Police, Lodge No. 85, the exclusive collective bargaining representative

of Capitol Police Officers. At all relevant times hereto, Bolinger and Respondents were subject to the terms of a collective bargaining agreement, which prohibits discipline except for just cause and that contains a grievance and arbitration procedure for challenging discipline and other contractual violations.

The Department of General Services is the Commonwealth Agency through which all Capitol Police Officers are employed. Respondent Gary Crowell served as Secretary of the Department of General Services and Respondent John R. McCarty served as Deputy Secretary for the Administration of the Department of General Services at the time the cause of action arose.

On September 3, 1995, Bolinger was arrested and charged with disorderly conduct, resisting arrest, public drunkenness and criminal mischief. On September 6, 1995, Respondent McCarty, acting under the direction of Respondent Crowell, suspended Bolinger without pay, effective September 3, 1995, until disposition of the criminal charges. Respondents imposed the suspension without providing Bolinger with a notice of the charges against him or an opportunity to respond to those charges. On or about September 14, 1995, the Fraternal Order of Police, Lodge No. 85 (hereinafter "FOP") filed a contractual grievance protesting the suspension. By letter dated September 29, 1995, McCarty denied the grievance without a hearing.

On October 17, 1995, McCarty, acting under the direction of Crowell, notified Bolinger that his employment as a Capitol Police Officer was terminated effective October 16, 1995. McCarty imposed termination without providing Bolinger with notice of the charges against him or an

opportunity to respond to those charges. On or about October 27, 1995, the FOP responded by filing a grievance protesting Bolinger's termination. McCarty denied the termination grievance by letter dated November 7, 1995. There was no hearing provided to Bolinger prior to issuance of this denial.

The FOP processed Bolinger's suspension and termination grievances through all steps of the contractual grievance procedure. It demanded arbitration of those grievances on June 6, 1996, following the Commonwealth's final denial. On or about July 18, 1996, the charge of disorderly conduct was reduced and Bolinger plead guilty to one charge of summary harassment in the Lancaster County Court of Common Pleas. All other charges against Bolinger were nolle prossed. In a letter dated August 6, 1996, McCarty, again acting under direction of Crowell, confirmed Bolinger's termination from Capitol Police employment. On February 25, 1997, an arbitration hearing convened to consider Bolinger's grievances. Prior to the completion of the hearing, the parties to the case, the Commonwealth of Pennsylvania and the FOP, agreed to a settlement wherein Bolinger was reinstated as a Capitol Police Officer with back pay, benefits and seniority from July 18, 1996 (when the plea agreement was reached) through the date of reinstatement. Pursuant to the settlement, the FOP withdrew the grievances but without precedent or prejudice to Bolinger's rights.

As a result of his suspension and termination, Bolinger did not receive the pay and benefits of public employment from September 3, 1995, through March 2, 1997. Bolinger lost wages in the amount of $3,961.48 during the suspension. He also paid $3,901.67 for treatment of alcohol

dependency during this period, which the parties agree would have been covered by the Capitol Police employee benefits package. Bolinger lost an additional $26,681.80 in lost wages for the period of termination not covered by the grievance settlement agreement. This period was October 16, 1995 through July 18, 1996.

Bolinger filed the initial Complaint in the Dauphin County Court of Common Pleas, Pennsylvania, under 42 U.S.C. § 1983, alleging that Respondents' refusal to provide him with notice of the charges and an opportunity to respond prior to suspension and termination violated his Fourteenth Amendment due process rights. The case was subsequently removed to the United States District Court for the Middle District of Pennsylvania. In connection with Respondents' Motion, the District Court entered an Opinion and Order dated November 14, 1997, dismissing Bolinger's claims relating to his September 6, 1995 suspension from employment. It also dismissed all claims against then Defendants Ridge, Santoro, Green, Paese and Tufano for lack of personal involvement or knowledge of Bolinger's discipline. Bolinger's claims against Respondents McCarty and Crowell with regard to the termination of his employment survived the dismissal motion. The parties subsequently filed a joint Stipulation of Facts, which was followed closely by Cross-Motions for Summary Judgment.

The District Court granted Summary Judgment for Respondents and against Bolinger by Opinion and Order dated March 2, 1998. The Court found that the governmental interests propounded by Respondents in terminating Bolinger outweighed the probative value of providing Bolinger with a pre-termination hearing. It focused on the provision in the State Civil Service law prohibiting

suspensions of more than thirty (30) working days, thus leaving Respondents with the decision to either reinstate or terminate Bolinger. The Court found that the Respondents could not return an officer charged with a crime without reducing public confidence in police services, thus raising the government's interest in effecting Bolinger's immediate termination.

Bolinger filed a timely Notice of Appeal to the United States Court of Appeals for the Third Circuit challenging the order granting Summary Judgment to Respondents Crowell and McCarty. By Opinion and Order dated March 9, 1999, the Third Circuit Court affirmed the District Court. It found that the governmental interest in immediately terminating Bolinger outweighed Bolinger's interest in receiving a notice of the charges against him and an opportunity to respond to those charges.

The question raised in this Petition is whether, in accordance with the principles of due process, Respondents Crowell and McCarty were required to provide Bolinger with a notice of the charges against him and an opportunity to respond to those charges prior to permanently terminating his employment.

REASONS FOR GRANTING THE WRIT

The Fourteenth Amendment provides that no person shall be deprived of property without due process of law. U.S. Const. amend. XIV, § 1. Although there is no enforcement provision set forth in the Amendment, Congress created a mechanism for enforcing these rights via Section 1983 of the Civil Rights Act. 42 U.S.C. § 1983. This Section provides in pertinent part that if a person acting

under the color of State law shall deprive another person of constitutional rights, that person shall be liable to the injured party.

It is well established that a person with a legitimate expectation of continued employment has a property interest in that employment. In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), this Honorable Supreme Court held that when, under the terms of a State Civil Service Act, an employee is subject to dismissal only for misfeasance, he is vested with a property right in continued employment. *Id.* at 538-539. In the instant case, Bolinger's employment was governed by the terms of the collective bargaining agreement between his employer and his representative organization, and he was also covered by the terms of the Pennsylvania Civil Service Act. 71 P.S. §§ 741.1-741.1005. Both the collective bargaining agreement and the Civil Service statute, at Section 807, *Id.* § 741.807, provide that covered employees shall not be discharged except for just cause. This limitation on the government employer's authority to remove Capitol Police Officers creates a property right in Bolinger's continued employment. This Court detailed the level of process due to public employees facing termination when it decided *Loudermill*, *supra*. This Court held that it is an essential element of due process to provide an employee with a constitutionally protected property interest in his employment notice and an opportunity for " 'some kind of hearing' " prior to discharge. 470 U.S. at 542 (quoting *Board of Regents v. Roth*, 408 U.S. 564, 569-70 (1972)). It recognized that the competing interests of employee and employer alike must be weighed in order to determine the need for some form of pre-termination hearing. These include "the private interest in retaining employment,

the governmental interest in the expeditious removal of unsatisfactory employees and the avoidance of administrative burdens." *Loudermill*, 470 U.S. at 543 (citing *Matthews v. Eldridge*, 424 U.S. 319 (1976)).

The Third Circuit held that when the facts of this case are considered, the Respondents' interest in removing Bolinger outweighed Bolinger's interest in presenting his side of the case. It reasoned that the government had a very strong interest in removing Bolinger from active police duty while criminal charges were pending. It added that Bolinger's interest in a pre-termination procedure was weakened by several factors. First, a post-termination grievance procedure existed and Bolinger had access to it. Second, Bolinger's employment status was not technically affected due to the fact that he was already suspended without pay and benefits. Third, Respondents' verified the existence of the criminal charges, which lessened the risk of an erroneous deprivation of employment and the probative value of any further information from Bolinger. The Third Circuit further explained that because of the thirty (30) day limit on suspensions, Respondents faced a dilemma of whether to reinstate Bolinger with criminal charges or to terminate his employment. This dilemma, according to the Court, would not be resolved by the use of a pre-termination procedure. In essence, the Third Circuit reasoned that where a police officer faces criminal charges, the mere existence of those charges mandates discharge despite anything the officer might have to say on the matter.

In *Loudermill*, this Supreme Court recognized the obvious value of an employee presenting his side of a case given that "[d]ismissal, for cause will often involve factual disputes." 470 U.S. at 543. It then made the following point:

> Even where the facts are clear, the appropriateness or necessity of the discharge may not be; in such cases, the only meaningful opportunity to invoke the discretion of the decisionmaker is likely to be before the termination takes place.

Id. In *National Labor Relations Board v. Weingarten*, 420 U.S. 251 (1975), this Supreme Court addressed the significance of pre-disciplinary investigations in holding that employees have a right to union representation during pre-disciplinary interviews. This Court emphasized that despite the existence of a post-disciplinary grievance process that provides an employee with representation, the statements of the employee before discipline is imposed is a critical point. The following excerpt from that Opinion is instructive:

> Respondent [employer] suggests nonetheless that union representation at this stage is unnecessary because a decision as to employee culpability or disciplinary action can be corrected after the decision to impose discipline has become final. In other words, respondent would defer representation until the filing of a formal grievance challenging the employer's determination of guilt after the employee has been discharged or otherwise disciplined. *At that point, however, it becomes increasingly difficult for the employee to vindicate himself, and the value of representation is correspondingly diminished. The employer may then be more concerned with justifying his actions than re-examining them.*

Id. at 263-64 (emphasis added).

There is no dispute in the instant case that Respondents' investigation of the criminal charges against Bolinger consisted of nothing more than verifying their existence. Respondents never formally charged Bolinger with precise items of misconduct, nor did they take his side of the story. Bolinger ultimately plead guilty to one charge of summary harassment while all remaining charges were nolle prossed. The District Court held that the criminal charges, although misdemeanors, were sufficient to suggest a disregard of the laws thereby substantiating the decision to terminate. The critical point, however, is whether the charges were valid. Certainly, Bolinger's account concerning the facts giving rise to these criminal charges affects their validity. An employer should have sufficient faith in its employees to at least take their side of the story rather than presuming guilt; yet, this is what Respondents did to Bolinger. This point is the heart of due process in the employment setting.

The fact that Respondents faced a decision to either reinstate or terminate Bolinger following when the thirty (30) day suspension period expired is of no moment. In *Gilbert v. Homar*, 520 U.S. 924 (1997), this Supreme Court addressed the issue of whether a police officer charged with a felony is entitled to notice of the charges and an opportunity to respond prior to unpaid suspension by his employer. This Court emphasized the difference between the length and finality of the employee's deprivation in suspension and termination cases. It held that the suspended employee is not entitled to a pre-disciplinary hearing so long as a sufficiently prompt post-suspension hearing procedure exists. This Court observed that unlike a termination case, where " 'the only meaningful opportunity to invoke the discretion of the decision maker is likely to be before the termination takes effect,' " there is ample opportunity in a suspension case to invoke the employer's

discretion later. *Id.* at 934 (quoting *Loudermill*, 470 U.S. at 543). The Court added the following statement regarding suspensions:

> [A] short delay actually benefits the employee by allowing state officials to obtain more accurate information about the arrest and charges. [The employee] "has an interest in seeing that a decision concerning his or her continued suspension is not made in excessive haste." If the State is forced to act too quickly, the decision maker "may give greater weight to the public interest and leave the suspension in place."

Homar, 520 U.S. at 935 (quoting *FDIC v. Mallen*, 486 U.S. 230, 243 (1988)).

This Court's candor in recognizing the harshness of a termination action is significant. Although the officer facing felony charges in *Homar* was denied pre-suspension procedures, this Court carefully distinguished suspensions from terminations. It noted that further investigation into the criminal charges pending suspension actually benefits the affected employee. The benefit is obviously assurance that the employer will not grasp the ultimate property deprivation, which is termination, without obtaining "more accurate information about the arrest and charges." *Id.* Here, Respondents could have obtained more information about Bolinger's criminal charges and arrest by providing him with alleged charges of employee misconduct and an opportunity to respond to those charges. Respondents did not afford Bolinger such opportunity but summarily terminated him. Respondents actions violate the reasoning of this Court in *Homar*, *supra*.

THE THIRD CIRCUIT'S DECISION IS IN CONFLICT WITH THE PRIOR THIRD CIRCUIT DECISION IN *GNIOTEK* AND THOSE OF OTHER CIRCUIT COURTS ON THE PRE-TERMINATION HEARING ISSUE.

In *Gniotek v. City of Philadelphia*, 808 F.2d 241 (3d Cir. 1986), a group of Philadelphia Police Officers facing criminal charges on counts of bribery alleged that the City violated their due process rights by terminating them without adequate pre-deprivation hearings. The Third Circuit held that when the officers were given notice of suspension with intent to dismiss, the suspensions were de facto dismissals entitling said officers to some form of pre-deprivation hearing. The Court ultimately held that when the employer delivered written notice to the officers of the charges against them and then asked if they wished to make a statement, the officers received the required process due under the standard enunciated in *Loudermill*.

Here, the Third Circuit concluded that a police officer charged with a crime was not entitled to notice and an opportunity to be heard prior to being discharged due to the fact that he works in a position of high public trust, and also because Respondents would be required to reinstate or terminate him based on the strict requirements of the Pennsylvania Civil Service Act. It is at once unclear how this thirty (30) day suspension and termination involving Bolinger is different from that in *Gniotek*, where the officers on suspension with intent to terminate were entitled to notice and an opportunity to respond. The Third Circuit's decision here directly conflicts with its prior holding in *Gniotek* and the aforementioned decisions of this Supreme Court. It also conflicts with the decisions of other Circuit Courts of

Appeals where public employees have been granted pre-termination hearing rights.

In *Chaney v. Suburban Bus Division of the Regional Transportation Authority*, 52 F.3d 623 (7th Cir. 1995), the Seventh Circuit addressed the issue of whether a bus driver terminated for his involvement in an accident (as well as for his prior work history) was entitled to a pre-termination hearing when a post-termination grievance-arbitration procedure was available. There, the bus driver was suspended without pay and then terminated. The employer provided some notice of the charges prior to suspension but not termination. The driver appealed the termination to arbitration and was awarded reinstatement with back-pay. He later filed a Section 1983 civil rights action contending that the employer's refusal to provide him with pre-termination notice of the charges and an opportunity to respond violated his Fourteenth Amendment right to procedural due process. The Seventh Circuit agreed with Chaney. It held that due process requires notice and an opportunity to respond even where post-termination arbitration procedures exist. The Court added that providing notice and opportunity to respond before termination does not significantly burden the employer. In fact, it held that such procedures "would help avoid erroneous dismissals, thereby saving an employee the difficulties of unemployment and both sides the burden of subsequent arbitration." *Id.* at 629.

In *Harrison v. Wille*, 132 F.3d 679 (11th Cir. 1998), the Eleventh Circuit examined the issue of whether a pre-termination hearing is necessary when post-termination hearing procedures exist and criminal charges are the cause of the dismissal. There, a deputy sheriff was suspended and

then terminated for alleged theft of items from an evidence locker. The Court held that the deputy received ample notice and an opportunity to respond to the charges despite his refusal to answer on Fifth Amendment grounds. In reaching this conclusion, the Eleventh Circuit provided instructive reasoning:

> There must be "some kind of hearing" before termination of an employee with a protected property interest in his employment. The termination of employment is a severe deprivation, although the interest of the Sheriff's office in terminating deputies for misconduct is great. The importance of Plaintiff's property interest makes it necessary to provide some sort of pre-termination hearing, which includes notice and an opportunity to be heard.

Id. at 604 (quoting *Loudermill*, 470 U.S. at 542-43).

In *Schaper v. City of Huntsville*, 813 F.2d 709, *rehearing denied*, 818 F.2d 865 (5th Cir. 1987), a police officer was indicted for falsifying car title documents and pleaded no contest to the charges. He was later dismissed by his employer for falsifying the documents and for other department policy violations. The Fifth Circuit held that Schaper was entitled to a limited pre-termination hearing and that he in fact received one when the employer provided him with a memorandum explaining the charges and stating that Schaper may respond. *Id.* at 714-15. The Fifth Circuit emphasized that while the government employer's interest in removing unsatisfactory employees is strong, that interest merely modifies the level of pre-termination hearing necessary to the point where a limited one is sufficient to

satisfy the employee's private interest in not being deprived of his livelihood without due process. *Id.* at 716; *see also Browning v. City of Odessa*, 990 F.2d 842 (5th Cir. 1993) (holding that a discharged firefighter is entitled to a limited pre-termination hearing when a full post-termination procedure exists); *McMurphy v. City of Flushing*, 802 F.2d 191 (6th Cir. 1986) (holding that *Loudermill* requires a pre-termination hearing before a police officer can be discharged). None of these decisions conclude that the pre-termination hearing process may be eliminated. This is what the Third Circuit concluded, however.

The Third Circuit, like the District Court before it, evaluated Bolinger's termination by applying the procedural due process factors this Court set forth in *Matthews v. Eldridge*, 424 U.S. 319 (1976). This Court identified the process of weighing procedural due process factors as follows:

> [I]dentification of the specific dictates of due process generally requires consideration of three distinct factors: first, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probative value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

424 U.S. at 335. The private interest here is Bolinger's continuation of his employment without permanent

termination. The significance of the permanent termination as opposed to suspension without pay is both substantial and obvious. This Court recognized the difference in *Gilbert v. Homar*, 520 U.S. 924 (1997). Similarly, the Third Circuit extended pre-termination due process protection to police officers facing criminal charges in *Gniotek v. City of Philadelphia*, 808 F.2d 241 (3d Cir. 1986). In both of those cases, the issuing courts emphasized the importance of a full investigation of the charges against the police officer prior to termination. The importance of the officer providing his account of the questioned incident is obvious. Here, the Respondents did nothing more than verify the existence of criminal charges. Their failure to discuss the incident with Bolinger demonstrates the incomplete nature of their investigation. It is entirely possible that Bolinger would have provided Respondents with information leading them to the same conclusion reached by the criminal court, and the prosecutor who withdrew all but one of the charges, which was that Bolinger was not guilty of the laundry list of misdemeanors he faced and therefore not in a position where termination was required.

The failure of the employer to make a full investigation of an alleged criminal incident by offering the subject employee the opportunity to offer a response raises the likelihood that a termination of employment will be based on erroneous information. Meanwhile, the terminated police officer, saturated with the stigma of being fired, and therefore initially adjudged by his employer as a criminal, must await a grievance hearing to explain his side of the questioned events. The complete loss of pay and benefits as well as the damage to reputation is a huge loss for the employee to suffer. It was a huge loss to Bolinger.

The Respondents' interest in preserving public trust in law enforcement is not interrupted or adversely affected by providing Bolinger with a notice of charges and the opportunity to make a response to those charges. Rather, there should be greater interest in assuring the taxpaying public that they do not make hasty decisions concerning government employees without all of the facts available. Moreover, there is little imposition to the Commonwealth in providing Bolinger with an opportunity to respond. Respondents could have provided Bolinger with this opportunity at any time during his thirty (30) day suspension; they simply chose not to do so. The *Matthews* factors actually weigh in Bolinger's favor.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

GARY M. LIGHTMAN
Counsel of Record
ERIC C. STOLTENBERG
LIGHTMAN & WELBY
Attorneys for Petitioner
2705 North Front Street
Harrisburg, PA 17110
(717) 234-0111

APPENDIX A — MEMORANDUM OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED MARCH 9, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7194

ALAN D. BOLINGER, JR.

Appellant,

vs.

THOMAS RIDGE, Individually and in his capacity as Governor of the Commonwealth of Pennsylvania; GARY CROWELL, Individually and his official capacity as Secretary of the Department of General Services of the Commonwealth of Pennsylvania; JOHN R. MCCARTY, Individually and in his official capacity as Deputy Secretary for the Administration of the Department of General Services of the Commonwealth of Pennsylvania; GREGORY C. SANTORO, Individually and in his official capacity as Chief Counsel for the Department of General Services of the Commonwealth of Pennsylvania; GREGORY A. GREEN, Individually and in his official capacity as Director of the Bureau of Personnel for the Department of General Services of the Commonwealth of Pennsylvania; THOMAS G. PAESE, Individually and in his official capacity as the Secretary of Administration of the Commonwealth of Pennsylvania; PAUL A. TUFANO, Individually and in his official capacity as General Counsel of the Commonwealth of Pennsylvania.

Appendix A

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 97-01342)
District Judge: Honorable William W. Caldwell

Submitted Under Third Circuit LAR 34.1(a)
February 19, 1999

BEFORE: GREENBERG, LEWIS and BRIGHT,*
Circuit Judges.

(Filed MAR 09, 1999)

MEMORANDUM OPINION OF THE COURT

LEWIS, *Circuit Judge*.

Alan Bolinger appeals the District Court's order granting summary judgment to appellees Gary Crowell and John McCarty. For the following reasons, we will affirm.

I.

Bolinger is a Capitol police officer employed by the Department of General Services ("DGS"), an agency of the Commonwealth of Pennsylvania. Crowell is the Secretary of DGS, and McCarty is the Deputy Secretary for

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* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

Administration of DGS. On September 3, 1995, Bolinger was arrested and charged with disorderly conduct, resisting arrest, public drunkenness and criminal mischief. On September 6, 1995, McCarty suspended Bolinger without pay pending review of the criminal charges. On October 17, 1995, with the criminal charges still pending, McCarty terminated Bolinger's employment.[1] McCarty executed these orders under the direction of Crowell, and without filing formal charges or holding a pre-disciplinary hearing. However, the union filed grievances in protest of Bolinger's suspension and dismissal, which McCarty subsequently denied.

On July 18, 1996, Bolinger pleaded guilty to one charge of summary harassment. All other charges against him were dropped. On February 25, 1997, at Bolinger's request, the parties entered into a grievance arbitration hearing. However, before the hearing concluded, the parties reached a settlement agreement. Pursuant to the settlement agreement, DGS reinstated Bolinger and granted him back pay, benefits, and seniority dating back his guilty plea.

On September 3, 1997, Bolinger filed suit under 42 U.S.C. § 1983, alleging that his suspension and termination violated his Fourteenth Amendment right to due process. On November 14, 1997, the District Court dismissed Bolinger's claims against all defendants except for Crowell and McCarty, and all claims except those arising from his

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1. Under Pennsylvania's Civil Service Law, no civil service employee can be suspended for more than thirty working days in one calendar year. *See* 7 Pa. Stat. Ann. § 741.803. Thus, by October 17, 1995, Bolinger's allowable period of suspension had expired.

termination. On January 15, 1998, the parties filed cross-motions for summary judgment and entered into a stipulation of facts. On March 2, 1998, the District Court granted summary judgment in favor of Crowell and McCarty. This appeal followed.

We have jurisdiction over this appeal pursuant to 28 U.S.C. § 1291. We exercise plenary review over a District Court's grant of summary judgment, and apply the same test that the District Court should have applied. *Ersek v. Township of Springfield*, 102 F.3d 79, 83 (3d Cir. 1996).

II.

On appeal, Bolinger alleges that McCarty and Crowell violated his Fourteenth Amendment right to due process when they fired him without the benefit of a pre-disciplinary hearing. To evaluate this claim, we must weigh: (1) the government's interests in taking the official action; (2) the private interest affected by the official action; and (3) the risk that this interest was erroneously deprived by the procedures used, and the probable value, if any, of additional or substitute procedural safeguards. *See Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

After examining these factors, we conclude that the governmental interest in terminating Bolinger outweighed any deprivation that he might have suffered. It is clear that the government had a very strong interest in removing Bolinger from active duty as a Capitol police officer until the criminal charges against him were resolved. *See Gilbert v. Homar*, 117 S. Ct. 1807, 1813 (1997). Conversely,

Bolinger's interest in a pre-disciplinary hearing, while not trivial, was considerably weaker given that he had access to, and availed himself of, the grievance and arbitration procedures that eventually lead to his reinstatement. *See Dykes v. SEPTA* 68 F.3d 1564, 1571-72 (3d Cir. 1995). In addition, Bolinger had already been suspended without pay at the time he was fired, thus, his termination technically did not affect his interest.

Finally, the risk of error and the probative value of additional substitute procedural safeguards was low. There was no risk that Bolinger's termination was based on erroneous information because McCarty and Crowell terminated Bolinger after confirming that he had been arrested and charged with criminal conduct. Moreover, given Pennsylvania's thirty-day limitation on suspension, even if a disciplinary hearing had been held, McCarty and Crowell still would have faced the dilemma of whether to reinstate Bolinger with the criminal charges pending or to terminate him. We cannot envision a substitute procedure that would have avoided this problem.

Accordingly, we find that the District Court did not err in granting summary judgment to McCarty and Crowell.

III.

For the foregoing reasons, we will affirm the District Court's judgment.

Appendix A

TO THE CLERK:

Please file the foregoing opinion.

s/ [illegible]
Circuit Judge

APPENDIX B — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED MARCH 9, 1999

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 98-7194

ALAN D. BOLINGER, JR.

Appellant,

vs.

THOMAS RIDGE, Individually and in his capacity as Governor of the Commonwealth of Pennsylvania; GARY CROWELL, Individually and in his official capacity as Secretary of the Department of General Services of the Commonwealth of Pennsylvania; JOHN R. MCCARTY, Individually and in his official capacity as Deputy Secretary for the Administration of the Department of General Services of the Commonwealth of Pennsylvania; GREGORY C. SANTORO, Individually and in his official capacity as Chief Counsel for the Department of General Services of the Commonwealth of Pennsylvania; GREGORY A. GREEN, Individually and in his official capacity as Director of the Bureau of Personnel for the Department of General Services of the Commonwealth of Pennsylvania; THOMAS G. PAESE, Individually and in his official capacity as the Secretary of Administration of the Commonwealth of Pennsylvania; PAUL A. TUFANO, Individually and in his official capacity as General Counsel of the Commonwealth of Pennsylvania.

Appendix B

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

(D.C. Civil No. 97-01342)
District Judge: Honorable William W. Caldwell

Submitted Under Third Circuit LAR 34.1(a)
February 19, 1999

BEFORE: GREENBERG, LEWIS and BRIGHT,**
Circuit Judges.

JUDGMENT

This cause came to be considered on the record from the United States District Court for the Middle District of Pennsylvania and was submitted pursuant to Third Circuit LAR 34.1(a) on February 19, 1999.

On consideration whereof it is now ordered and adjudged by this court that the judgment of the district court entered on March 2, 1998, be and the same is hereby **AFFIRMED**.

Costs taxed against appellant.

ATTEST:

s/ P. Douglas Sisk
Clerk

DATE: MAR 09 1999

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* The Honorable Myron H. Bright, Senior United States Circuit Judge for the Eighth Circuit, sitting by designation.

APPENDIX C — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED AND FILED MARCH 2, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-97-1342

ALAN D. BOLINGER, JR.,

Plaintiff

vs.

THOMAS J. RIDGE, individually and in his official capacity as Governor of the Commonwealth of Pennsylvania, et al.,

Defendants

MEMORANDUM

This is a civil rights action, arising from alleged due process violations in Plaintiff's suspension without pay, and subsequent termination, from his position as a Capitol Police Officer. Before us are cross-motions for summary judgment.

I. *Background*

Plaintiff is an officer of the Capitol Police, employed by the Commonwealth of Pennsylvania through the Department of General Services ("DGS"). (Stip. ¶¶ 1-2).

Appendix C

Defendants, Gary E. Crowell and John R. McCarty, are DGS administrators. The employment relationship between Plaintiff and Defendants was governed by the collective bargaining agreement between the Commonwealth and the Fraternal Order of Police. (Stip. ¶ 4).

On September 3, 1995, Plaintiff was arrested at his residence and charged with disorderly conduct, resisting arrest, public drunkenness, and criminal mischief. (Stip. ¶ 5). On September 6, 1995, McCarty, acting under the direction of Crowell, suspended Plaintiff without pay. (Stip. ¶ 6). While suspended, Plaintiff did not receive any compensation or benefits. (Stip. ¶ 26).

On September 14, 1995, Plaintiff's union filed a grievance on his behalf. (Stip. ¶¶ 8-9). McCarty denied the grievance on September 29, 1995. (Stip. ¶ 10).

McCarty, again at Crowell's direction, terminated Plaintiff on October 17, 1995. (Stip. ¶ 11). The union filed a grievance in response on October 27, (Stip. ¶ 13), which was denied by McCarty on November 7, (Stip. ¶ 15).

On May 21, 1996, the Bureau of Labor Relations denied several subsequent grievances filed by Plaintiff protesting his termination. (Stip. ¶¶ 16-17). On June 6, 1996, Plaintiff gave notice of his desire to have the matter submitted to arbitration. (Stip. ¶ 18).

On July 18, 1996, Plaintiff pled guilty to one charge of summary harassment in the Lancaster County Court of Common Pleas. (Stip. ¶ 19). The remaining criminal charges against Plaintiff were dropped. (Stip. ¶¶ 19-20).

Appendix C

On August 6, 1996, McCarty, acting at Crowell's direction, confirmed Plaintiff's termination. (Stip. ¶ 21). On October 21, 1996, Plaintiff requested a grievance arbitration hearing. (Stip. ¶ 22). This hearing was convened on February 25, 1997, but before it was concluded the parties reached a settlement agreement. (Stip. ¶¶ 23-24). Plaintiff was reinstated to his position and received back pay, benefits, and seniority for the period from July 18, 1996 (the date of his guilty plea) to the date of reinstatement. (Stip. ¶ 24). The parties entered into the settlement without prejudice to their rights. (Stip. ¶ 25).

Plaintiff commenced this action on September 3, 1997, alleging a violation of his due process rights. On November 14, 1997, we granted in part a motion to dismiss filed by Defendants, dismissing certain defendants from the case, and dismissing Plaintiff's claims arising from his suspension on September 6, 1995. Remaining in the case are Plaintiff's claims against Defendants McCarty and Crowell, arising from the October 17, 1995 decision to terminate his employment. The parties have filed cross-motions for summary judgment, and have entered into a Stipulation of Facts.

II. *Standard of Review*

Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56; *Celotex Corp. v. Catrett*, 477 U.S. 317, 106

S. Ct. 2548, 91 L. Ed. 2d 265 (1986). In reviewing the evidence, facts and inferences must be viewed in the light most favorable to the nonmoving party. *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 1356, 89 L. Ed. 2d 538, 553 (1986). Summary judgment must be entered in favor of the moving party "[w]here the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party. . . ." *Id.*, 475 U.S. at 586-87, 106 S. Ct. at 1356, 89 L. Ed. 2d at 552 (citations omitted).

When a moving party has carried his or her burden under Rule 56, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts. . . ." *Matsushita*, 475 U.S. at 586-87, 106 S. Ct. at 1356, 89 L. Ed. 2d at 552 (citations omitted). The nonmoving party "must present *affirmative evidence* in order to defeat a properly supported motion for summary judgment," and cannot "simply reassert factually unsupported allegations contained in [the] pleadings." *Williams v. Borough of West Chester*, 891 F.2d 458, 460 (3d Cir. 1989) (citation omitted). "If the [nonmoving party's] evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson v. Liberty Lobby*, 477 U.S. 242, 249-50, 106 S. Ct. 2505, 2511, 91 L. Ed. 2d 202, 212 (1986) (citations omitted).

III. *Discussion*

A state employee who may be dismissed from employment only for cause has a due process right under the Fourteenth Amendment to notice and a hearing

concerning a suspension or dismissal. *Gilbert v. Homar*, 117 S. Ct. 1807, 1811, 138 L. Ed. 2d 120, 126 (1997). Precisely how this right must be administered will depend on the balancing of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.

Id. at 1812, 138 L. Ed. 2d at 128 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, 33 (1976)).

While the Fourteenth Amendment will generally require a pre-deprivation hearing, certain circumstances will justify employer action without prior notice or opportunity to be heard. *Gilbert*, 117 S. Ct. at 1813, 138 L. Ed. 2d at 128-29. Following *Gilbert*, we found that Defendants' suspension of Plaintiff without a pre-deprivation hearing did not violate his due process rights, in light of the significant governmental interests which are implicated when a peace officer is charged with a serious crime. (Nov. 14, 1997 Mem. at 5-8).

Defendants now argue that their decision to terminate Plaintiff without a pre-deprivation hearing was similarly justified. Plaintiff, in turn, argues that Defendants' failure to provide him with notice and an opportunity to be heard

prior to his termination constitutes a violation of his Fourteenth Amendment rights as a matter of law. We will weigh these arguments under the *Matthews* test.[1]

Once Plaintiff was suspended on September 6, Defendants' options in handling his case were limited by Pennsylvania law. Pennsylvania's Civil Service Law provides that no civil service employee shall be suspended for more than thirty working days in one calender year. 7 Pa. Stat. Ann. § 741.803. Because of this provision, Defendants could not simply allow Plaintiff to remain on suspension until the criminal charges pending against him were resolved. Defendants were faced instead with the choice of reinstating Plaintiff to his position while charges were pending against him, or terminating him.

Under these circumstances, Defendants' interest in terminating Plaintiff was extremely high. Returning Plaintiff to active duty while criminal charges for disorderly conduct, resisting arrest, public drunkenness, and criminal mischief were pending against him could seriously undermine public

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1. Defendants suggest that Plaintiff's pursuit of his Fourteenth Amendment claims after having entered into a settlement with his employer constitutes an attempt to take "two bites at the apple," and weighs in favor of dismissal. We find this argument unconvincing. As Defendants acknowledged in the Stipulation of Facts, the parties entered into the settlement without prejudice. (Stip. ¶ 25). If Defendants had wanted to prevent Plaintiff from asserting his Fourteenth Amendment claims in a subsequent civil action, they should have obtained a release of such claims as part of that settlement. Having failed to obtain a release, Defendants can not now complain about Plaintiff's exercise of rights which he reserved under the settlement agreement.

confidence in the integrity of the Capitol Police. While the charges pending against Plaintiff were for misdemeanors, they were for offenses which suggest a disrespect for law and order and a lack of personal discipline. Clearly Defendants had a very significant interest in not reinstating Plaintiff. *See Gilbert*, 117 S. Ct. at 1813, 138 L. Ed. 2d at 128.

In contrast, it does not appear that Plaintiff's termination significantly altered his interests. Plaintiff's salary and benefits had already ceased as a result of his suspension, and he retained access to the grievance and arbitration procedures which eventually lead to the settlement reinstating him. While termination is generally a more severe sanction than suspension, *see Gilbert*, 117 S. Ct. at __, 138 L. Ed. 2d at 128, Plaintiff's termination had little practical effect on his interests once he was suspended without pay.

Finally, we must consider the risk of an erroneous deprivation, and the probative value of additional or substitute procedural safeguards. *Id.* at 1812, 138 L. Ed. 2d at 128. Defendants elected to terminate Plaintiff without a pre-deprivation hearing. It is indisputable that no exigency forced them to this decision: Plaintiff was already suspended, and Defendants had ample notice that the Civil Service Law limited his suspension to thirty working days. Defendants certainly could have provided Plaintiff with some form of notice and an opportunity to be heard prior to his termination.

It is not clear, however, whether there would have been any point to such a procedure. Even if Defendants had

conducted a hearing prior to deciding how to proceed in Plaintiff's case, they still would have been faced with a choice between terminating Plaintiff and reinstating him to active duty while criminal charges were pending against him. No substitute procedures could have eliminated the potential damage to the Governmental interests posed by reinstatement.[2] The Governmental interest at issue was not merely keeping Plaintiff from active duty if he was in fact guilty of the offenses with which he had been charged, but also the threat to public confidence in law enforcement posed by the spectacle of a peace officer defending such charges against him in criminal court while on active duty. No pre-deprivation hearing could possibly have prevented such threat; from Defendants' point of view, the only possible option was to terminate Plaintiff. If the charges against Plaintiff were ultimately resolved in his favor, Defendants would retain the option of reinstating Plaintiff. Indeed, this is precisely what happened, with Plaintiff receiving back pay, benefits, and seniority retroactively to the date upon which the most serious charges against him were dropped.

We conclude, therefore, that Defendants' conduct satisfies the *Mathews* test; Plaintiff's due process rights were

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2. It is questionable whether a pre-termination hearing would have afforded Plaintiff any additional protection, as Plaintiff had already begun the grievance and arbitration process under the collective bargaining agreement before he was terminated. *See Tweedall v. Fritz*, __ F. Supp. __, __, 1997 WL 797672, at *6 (S.D. Ind. Dec. 19, 1997); *Dykes v. SEPTA*, 68 F.3d 1564, 1571-72 (3d Cir. 1995), *cert. denied*, 116 S. Ct. 1434, 134 L. Ed. 2d 556 (1996).

not violated by his termination. This conclusion is, of course, largely a product of the unique and very public duty of law enforcement officers in our society, the nature of the particular offenses with which Plaintiff was charged, and the quandary faced by Defendants as a result of the limitation placed on their use of suspension as a form of discipline by 7 Pa. Stat. Ann. § 741.803. Under the specific and particular facts of this case, Defendants are entitled to summary judgment.

We will issue an appropriate order.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

Date: March 2, 1998

Appendix C

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-97-1342

ALAN D. BOLINGER, JR.,

Plaintiff

vs.

THOMAS J. RIDGE, individually and in his official capacity as Governor of the Commonwealth of Pennsylvania, et al.,

Defendants

ORDER

AND NOW, this 2nd day of March, 1998, it is Ordered that:

1. Plaintiff's motion for summary judgment, filed January 15, 1998 (Doc. No. 14), is **denied**.

2. Defendants' motion for summary judgment, filed January 15, 1998 (Doc. No. 16), is **granted**. The Clerk of Court shall enter judgment in favor of Defendants and against Plaintiff, and shall close the file.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

APPENDIX D — JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED AND FILED MARCH 2, 1998

United States District Court
MIDDLE DISTRICT OF PENNSYLVANIA

CASE NUMBER: 1:97-CV-1342
Judge Caldwell

ALAN D. BOLINGER, JR.,

Plaintiff

v.

THOMAS J. RIDGE; GARY E. CROWELL; JOHN R. McCARTY; GREGORY C. SANTORO; GREGORY A. GREEN: THOMAS G. PAESE AND PAUL A. TUFANO, individually and in their capacity as employees of the COMMONWEALTH OF PENNSYLVANIA

JUDGMENT IN A CIVIL CASE

* * *

☒ **Decision by Court.** This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that summary judgment be and is hereby entered in favor of the defendants, Thomas J. Ridge, Gary E. Crowell,

Appendix D

John R. McCarty, Gregory C. Santoro, Gregory A. Green, Thomas G. Paese and Paul A. Tufano, and against the plaintiff, Alan D. Bollinger, Jr.

March 2, 1998
Date

Mary E. D'Andrea
Clerk

s/ George T. Gardner
(By) Deputy Clerk
George T. Gardner

APPENDIX E — MEMORANDUM OPINION AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA DATED AND FILED NOVEMBER 14, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-97-1342

ALAN D. BOLINGER, JR.,

Plaintiff

vs.

THOMAS J. RIDGE, individually and in his official capacity as Governor of the Commonwealth of Pennsylvania, et al.,

Defendants

MEMORANDUM

This is a civil rights action, arising from alleged due process violations in Plaintiff's suspension without pay, and subsequent termination, from his position as a Capitol Police Officer. Before us is Defendants' motion to dismiss.

I. *Background*

Plaintiff is an officer of the Capitol Police, employed by the Pennsylvania Department of General Services

("DGS"). Defendant Thomas J. Ridge is the Governor of Pennsylvania. Defendant Gary E. Crowell is the Secretary of DGS. Defendant John R. McCarty is Deputy Secretary for Administration of DGS. Defendant Gregory C. Santoro is Chief Counsel for DGS. Defendant Gregory A. Green is Director of Personnel for DGS. Defendant Thomas G. Paese is Secretary of Administration for the Commonwealth. Defendant Paul A. Tufano is General Counsel for the Commonwealth.

On September 3, 1995, Plaintiff was arrested at his home and charged with misdemeanors including disorderly conduct, resisting arrest, public drunkenness, and criminal mischief. On September 6, 1995, McCarty, acting under the direction of Crowell, suspended Plaintiff without pay.

On September 14, 1995, Plaintiff's union filed a grievance on his behalf. McCarty denied the grievance on September 29, 1995.

McCarty, again at Crowell's direction, terminated Plaintiff on October 17, 1995. The union filed a grievance in response on October 27, which was denied by McCarty on November 7.

On May 21, 1996, the Bureau of Labor Relations denied several subsequent grievances filed by Plaintiff protesting his termination. On June 6, 1996, Plaintiff gave notice of his desire to have the matter submitted to arbitration.

Plaintiff entered into a plea agreement resolving the pending misdemeanor charges on July 18, 1996. Under that

agreement, Plaintiff pled guilty to a summary offense of harassment, and the other charges were dropped.

On August 6, 1996, McCarty, acting at Crowell's direction, confirmed Plaintiff's termination. On October 21, 1996, Plaintiff requested a grievance arbitration hearing. This hearing was convened on February 25, 199, but before it was concluded the parties reached a settlement agreement. Plaintiff was reinstated to his position and received back pay, benefits, and seniority for the period from July 18, 1996 to the date of reinstatement.

Plaintiff then filed this action against Defendants under 42 U.S.C. § 1983, seeking damages for the period from September 6, 1995 (the date of his suspension) through July 18, 1996 (the date of the plea agreement, and the effective date of his reinstatement). Plaintiff alleges that Defendants deprived him of his due process rights under the Constitutions of Pennsylvania and of the United States, by suspending and then terminating him without notice or an opportunity to be heard. Defendants have moved for dismissal under Fed. R. Civ. P. 12(b)(6).

II. *Standard of Review*

When considering a motion to dismiss under Rule 12(b)(6) "all facts alleged in the complaint and all reasonable inferences that can be drawn from them must be accepted as true." *Malia v. General Elec. Co.*, 23 F.3d 828, 830 (3d Cir. 1994). The motion must be denied unless the plaintiff cannot prove any facts in support of the claim which

would entitle it to relief. *Rocks v. Philadelphia*, 868 F.2d 644, 645 (3d Cir. 1989).

III. *Discussion*

Defendants argue that the complaint should be dismissed, as it fails to state a claim for a violation of Plaintiff's due process rights. In the alternative, Defendants argue that the complaint should be dismissed as to Ridge, Santoro, Green, Paese, and Tufano, as none of these defendants are alleged to have had any personal involvement in Plaintiff's suspension and termination.[1]

A. Violation of Plaintiff's Due Process Rights

A state employee who may be dismissed from employment only for cause has a due process right under the Fourteenth Amendment to notice and a hearing concerning a suspension or dismissal. *Gilbert v. Homar*,

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1. We need not separately consider the implications of Plaintiff's claims under the Pennsylvania state constitution. Plaintiff has not opposed Defendants' argument that these claims do not state an independent cause of action, and we therefore consider this argument to be unopposed. *See* M.D. Pa. R. Civ. P. 7.6. Furthermore, we can not consider any possible differences between the Federal and the Pennsylvania constitutions, as the parties have not addressed these differences squarely in their briefs. *Showers v. Spangler*, 957 F. Supp. 584, 589 (M.D. Pa. 1997); *Commonwealth v. Edmunds*, 586 A.2d 887, 894-95, 526 Pa. 374, 586 (1991).

Similarly, we will consider Defendants' substantive due process argument to be unopposed pursuant to Local Rule 7.6.

117 S. Ct. 1807, 1811, 138 L. Ed. 2d 120, 126 (1997). Precisely how this right must be administered will depend on the balancing of three distinct factors:

> First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest.

Id. at 1812, 138 L. Ed. 2d at 128 (quoting *Mathews v. Eldridge*, 424 U.S. 319, 335, 96 S. Ct. 893, 903, 47 L. Ed. 2d 18, 33 (1976)).

We will consider separately Defendants' action in suspending Plaintiff without pay on September 6, 1995, and the decision to terminate Plaintiff's employment on October 17, 1995.

1. The September 6, 1995 Suspension Without Pay

The balancing of the *Mathews* factors is illustrated by the Supreme Court's recent decision in *Gilbert*. That case involved the suspension of a university police officer following his arrest for a felony offense. The Court held that while such an employee is generally entitled to a hearing prior to suspension, 117 S. Ct. at 1811, 138 L. Ed. 2d at 126; *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532, 545-46, 105 S. Ct. 1487, 1495, 84 L. Ed. 2d 494, 506 (1985), the Governmental interests implicated when a peace officer

has been charged with a felony will permit the employer to immediately suspend the officer without violating his due process rights, so long as he is afforded a reasonably prompt post-suspension hearing. *Gilbert*, 117 S. Ct. at 1813, 138 L. Ed. 2d at 128-29.

Relying on this conclusion, Defendants contend that Plaintiff has suffered no violation of due process. They argue his suspension followed his arrest and the filing of criminal charges against him, and that his union's grievance and arbitration procedure provided an adequate post-suspension opportunity to be heard.

In response, Plaintiff contends that *Gilbert* does not apply to a peace officer who has been charged with misdemeanors, rather than felonies, and that Plaintiff was not provided an adequate post-suspension hearing.

While the Governmental interests implicated may be lessened when the employee in question is charged with misdemeanors, rather than felonies, they are still substantial. When, as here, a police officer is charged with offenses which seriously undermine the public trust placed in peace officers, such as disorderly conduct, resisting arrest, public drunkenness, and criminal mischief, the employer's interest in maintaining public confidence in the integrity of law enforcement will justify immediate suspension, without any pre-suspension hearing. *See Gilbert*, 117 S. Ct. at 1813, 138 L. Ed. 2d at 128.

Under *Gilbert*, Plaintiff was nonetheless entitled to a "sufficiently prompt postsuspension hearing." *Id.* This

requirement is satisfied by the grievance and arbitration procedure provided for in Defendant's collective bargaining agreement with Plaintiff's union:

> Where a due process claim is raised against a public employer, and grievance and arbitration procedures are in place, we have held that those procedures satisfy due process requirements, even if the hearing conducted by the Employer was inherently biased.

Dykes v. SEPTA, 68 F.3d 1564, 1571 (3d Cir. 1995) (quoting *Jackson v. Temple Univ.*, 721 F.2d 931, 933 (3d Cir. 1983)) (quotation marks, brackets, and ellipsis omitted), *cert. denied*, 116 S. Ct. 1434, 134 L. Ed. 2d 556 (1996). So long as the grievance procedure in place contains structural safeguards to ensure fairness, it will suffice to protect the employee's due process rights. *Dykes*, 68 F.3d at 1572.

Plaintiff advances no meaningful challenge to the fairness of the grievance procedure, arguing only that it was not sufficiently prompt. (*See* Pl. Brief at 12). We find this allegation to be unsupported by the record. Plaintiff filed a grievance within one week of his suspension; that grievance was decided one week later. While the arbitration hearing which ultimately lead to the resolution of Plaintiff's grievances did not take place until almost eighteen months after his suspension, the initial consideration of the grievances themselves was sufficiently prompt to protect Plaintiff's due process rights.

Defendants were entitled under the circumstances to suspend Plaintiff without a pre-suspension hearing, and the

grievance and arbitration procedure provided Plaintiff with a Constitutionally sufficient manner in which to be heard. Plaintiff has failed to state a claim with regard to his initial suspension.[2]

2. The October 17, 1995 Termination

Defendants' decision to terminate Plaintiff, on the other hand, presents a different problem. Because Plaintiff had already been suspended without pay, Defendants did not face the same set of exigencies calling for immediate action that was presented at the time of his suspension. Under *Gilbert*, Plaintiff had a right to notice and a hearing before his suspension was converted into a termination.

The presence of available grievance procedures will not excuse Defendants' failure to provide Plaintiff with a pre-termination hearing. *Gilbert* expresses a clear preference under the Fourteenth Amendment for notice and an opportunity to be heard *prior* to the adverse employment decision. 117 S. Ct. at 1811, 138 L. Ed. 2d at 126. Departure from this standard must be justified by circumstances which shift the balance of the three *Mathews* factors. *Id.* at 1812-14, 138 L. Ed. 2d at 127-30.

The first of these factors is the effect of the termination on the employee's interests. *Gilbert*, 117 S. Ct. at 1812.

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2. Plaintiff's reliance on the procedures outlined in the Governor's Code of Conduct, 4 Pa. Code §§ 7.174-7.176, is misplaced, because the Code of Conduct creates no substantive or procedural rights. *Werner v. Zazyczny*, 545 Pa. 570, 581, 681 A.2d 1331, 1336-37 (1996).

138 L. Ed. 2d at 128. Termination has a more significant impact on an employee's interests than suspension without pay. *See id.* at 1813, 138 L. Ed. 2d at 128. It is not clear from the record whether or not Plaintiff continued to receive benefits and to accrue seniority while suspended; for purposes of a motion to dismiss, we will construe the facts against the movant, and assume that he did. *See Malia*, 23 F.3d at 830. Termination ended Plaintiff's receipt of these benefits. In any event, termination represents a significant change in the employment relationship. Plaintiff's termination, even while suspended without pay, had a significant impact on his interests.

The second *Mathews* factor is the risk of erroneous deprivation, and the probative value of substitute procedural safeguards. *Gilbert*, 117 S. Ct. at 1812, 138 L. Ed. 2d at 128. While the risk of erroneous deprivation at the time of Plaintiff's termination was the same as it was at the time of his suspension, we must also weigh the presence at this stage of alterative safeguards: an internal DGS inquiry, or merely awaiting the outcome of the criminal proceedings.

The importance of these alternatives is clear in light of the final *Mathews* factor: the governmental interest. *Id.* at 1812, 138 L. Ed. 2d at 128. Unlike the substantial governmental interest at stake at the time of suspension, the Commonwealth's interest in terminating Plaintiff, after he has been suspended, is minimal. When an officer is suspended without pay, confidence in law enforcement is protected: the public need not fear that the Government is actively employing officers who lack respect for the law, and need not be concerned that public funds are going to support such officers while they are being investigated.

Considering Plaintiff had been suspended without pay, we conclude that Defendants have failed to show that the *Mathews* balancing would support his termination without some prior notice and hearing. Defendants are not, therefore, entitled to summary judgment on Plaintiff's claim concerning his termination.[3]

B. Absence of Personal Involvement

Defendants also maintain that Plaintiff has failed to state a claim upon which relief may be granted against Defendants Ridge, Santoro, Green, Paese, and Tufano, based upon the absence of any personal involvement on their part in the employment decisions that were made. Plaintiff responds that all of the Defendants played a role in his suspension and subsequent termination.

A governmental official may not be found liable under Section 1983 via *respondeat superior*. *Blanche Road Corp. v. Bensalem Township*, 57 F.3d 253, 263 (3d Cir. 1995); *Baker v. Monroe Township*, 50 F.3d 1186, 1190-91 (3d Cir. 1995). To establish liability, Plaintiff must show that each defendant was either personally involved in the conduct giving rise to the cause of action, or knew of the misconduct and approved of it. *Blanche Road*, 57 F.3d at 263.

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3. It is possible that the submission of Plaintiff's September 14, 1995 grievance, protesting his suspension, provided a constitutionally sufficient opportunity to be heard prior to his termination. However, we have no facts before us at this stage of the proceedings upon which we could base an assessment of the grievance process, and we must assume for purposes of Defendants' motion that it was inadequate to protect Plaintiff's Fourteenth Amendment rights.

Appendix E

Plaintiff has failed to state a claim against Ridge, Santoro, Green, Paese, and Tufano. The complaint does not allege that any of these defendants had any personal involvement whatsoever in the alleged misconduct, or that any of them knowingly approved of it.

Plaintiff argues that each of these defendants played a role in his firing, by virtue of each's role in the administrative process. We may dispose of these arguments as to Defendants Green and Ridge most easily. Plaintiff argues that Green, as Director of DGS, has ultimate responsibility for personnel decisions within the Department, and that Ridge, as Governor, has ultimate responsibility for the implementation of the Governor's Code of Conduct ("GCC") (which outlines the administrative procedures applied when a state employee is the subject of criminal charges). These are plainly traditional *respondeat superior* arguments, and are insufficient to give rise to liability under Section 1983.

With regard to Santoro, Plaintiff argues that as Chief Counsel to the DGS, he had a responsibility under the GCC to protect Plaintiff's rights during the administrative process. The GCC provides that the Chief Counsel *may* assist the agency head in his investigation of criminal charges against an employee. 4 Pa. Code § 7.175(2). This language, however is discretionary; we can not infer from this that Santoro necessarily *did* assist Crowell and McCarty in investigating the charges against Plaintiff. As the complaint contains no allegations of personal involvement by Santoro, we conclude that it has failed to state a claim against him under Section 1983.

Finally, Plaintiff argues that Paese, as Secretary of Administration, and Tufano, as General Counsel, had a responsibility under the GCC to review the final agency decision, and ratify it absent an abuse of discretion. *See* 4 Pa. Code § 7.176(c). The complaint, however, contains no allegations regarding the manner in which Paese and Tufano preformed this function. Absent some allegation that these defendants either personally engaged in misconduct which infringed Plaintiff's constitutional rights, or knowingly ratified misconduct by others, their role in the administrative process will not be sufficient to give rise to liability under Section 1983. *Blanche Road*, 57 F.3d at 263.

IV. *Conclusion*

Plaintiff has failed to state a claim based on his initial suspension and his claims arising from that suspension must be dismissed. Furthermore, Plaintiff has failed to state a claim against Ridge, Santoro, Green, Paese, and Tufano, and his claims against those Defendants must be dismissed.

Remaining in this case, therefore, are Plaintiff's claims against Defendants McCarty and Crowell, arising from the October 17, 1995 decision to terminate his employment.

We will issue an appropriate order.

s/ William W. Caldwell
William W. Caldwell
United States District Judge

Date: November 14, 1997

Appendix E

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

CIVIL ACTION NO. 1:CV-97-1342

ALAN D. BOLINGER, JR.,

Plaintiff

vs.

THOMAS J. RIDGE, individually and in his official capacity as Governor of the Commonwealth of Pennsylvania, et al.,

Defendants

ORDER

AND NOW, this 14th day of November, 1997, upon consideration of Defendants' motion to dismiss, filed September 10, 1997 (Doc. No. 3), it is Ordered that the motion is **granted in part** and **denied in part:**

1. Plaintiff's claims arising from his suspension on September 6, 1995 are **dismissed.**

2. Plaintiff's claims against Defendants Ridge, Santoro, Green, Paese, and Tufano are **dismissed.**

s/ William W. Caldwell
William W. Caldwell
United States District Judge

Supreme Court, U.S.
FILED
JUL 7 1999
OFFICE OF THE CLERK

No. 98-1950

In the Supreme Court of the United States

OCTOBER TERM, 1998

ALAN D. BOLINGER, JR.,
Petitioner

v.

THOMAS RIDGE, *et al.*,
Respondents

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

D. MICHAEL FISHER
Attorney General

BY: HOWARD G. HOPKIRK
Deputy Attorney General
Counsel of Record

CALVIN R. KOONS
Senior Deputy Attorney General

Office of Attorney General
15th Floor, Strawberry Sq.
Harrisburg, PA 17120
(717) 783-1478

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief, Appellate Litigation Section

QUESTION PRESENTED

Whether a state law enforcement officer who is terminated from his position without a hearing, based on the filing of criminal charges against him and in accordance with state civil service requirements, but who is subsequently afforded his rights through the grievance process provided for under a collective bargaining agreement, may recover additional damages for violation of his due process rights - in the nature of back-pay, compensatory damages, and attorney fees - in a civil rights action brought pursuant to 42 U.S.C. §§1983 & 1988?

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STATEMENT OF THE CASE

This case presents the question of whether a state law enforcement officer who is terminated from his position without a hearing, but who is subsequently afforded his rights through the grievance process provided for under a collective bargaining agreement, may recover additional damages for violation of his due process rights - in the nature of back-pay, compensatory damages, and attorney fees - in a civil rights action brought pursuant to 42 U.S.C. §§1983 & 1988.

1. Petitioner is a Capitol Police Officer employed by the Department of General Services ("DGS"), an agency of the Commonwealth of Pennsylvania. Pet. App. at 2a. Respondents are Gary E. Crowell, Secretary of DGS; and John R. McCarty, Deputy Secretary for Administration of DGS.[1] *Id.* at 2a-3a. Petitioner was suspended from his position as a Capitol Police Officer without pay on September 6, 1995 after being arrested and charged with disorderly conduct, resisting arrest, public drunkenness and criminal mischief. *Id.* at 3a. Eight days later, on September 14, 1994, petitioner filed a grievance of his suspension as provided for under the governing collective bargaining agreement. *Id.* at 10a. Petitioner's grievance was denied by Respondent McCarty on September 29, 1995. *Id.*

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[1] Thomas J. Ridge, Governor; Gregory C. Santoro, Chief Counsel for DGS; Gregory A. Green, Director of the Bureau of Personnel for DGS; Thomas G. Paese, Secretary of Administration of the Commonwealth; and Paul A. Tufano, General Counsel of the Commonwealth were originally named as defendants in this case. However, all claims against these individuals were dismissed by order of the district court on November 14, 1997 due to their lack of personal involvement in the matters alleged in the complaint. Pet. App. at 21a-31a. Petitioner did not appeal this decision. *Id.* at 4a.

Petitioner did not raise any issues regarding the propriety of his suspension in his appeal to the Court of Appeals. *Id.* at 4a.

Petitioner was subsequently terminated from his position effective October 16, 1995. *Id.* at 3a. Under existing state civil service rules, DGS was permitted to suspend petitioner for only thirty days, after which time it was required to either return him to active duty or terminate his employment. *Id.* at 3a n.1. Given these alternatives, respondents believed that they had no choice but to terminate his employment since the criminal charges against petitioner were still pending at that time. Although a hearing would have ordinarily been held prior to terminating the employment of a Capitol Police Officer, no hearing was held in this case since the suspension and termination were based on petitioner's arrest and the filing of criminal charges against him, a fact to which there appeared to be no real dispute. *Id.* at 14a-15a.

On October 27, 1995, petitioner filed a grievance of his termination as provided for under the terms of the collective bargaining agreement. *Id.* at 3a. This grievance was denied by Respondent McCarty on November 7, 1995. *Id.* at 10a. Subsequently, on May 21, 1996, the Bureau of Labor Relations for the Commonwealth of Pennsylvania denied petitioner's appeals from the denial of the grievances filed in connection with his suspension and termination. *Id.* On August 6, 1996, Respondent McCarty, under the direction of Respondent Crowell, confirmed petitioner's termination. *Id.* at 11a. On October 21, 1996, petitioner requested a grievance arbitration hearing as provided by the collective bargaining agreement. *Id.* On February 25, 1997, prior to the conclusion of the arbitration hearing in this matter, DGS entered a settlement agreement with petitioner in which he was reinstated to his position and given back-pay from the disposition date of the criminal charges

against him.[2] *Id.* at 3a. There is nothing in the record (and petitioner has at no time alleged otherwise) which would indicate that petitioner could not have obtained full compensation for his lost wages and benefits under the terms of the collective bargaining agreement if he had chosen to pursue the arbitration process to its conclusion instead of entering the settlement agreement.

2. Six months after entering the settlement agreement, petitioner commenced the present federal civil rights action alleging that his right to substantive and procedural due process under the United States and Pennsylvania Constitutions was violated when he was suspended and subsequently terminated from his position with the Capitol Police, without pay and without being afforded a pre-disciplinary hearing. Pet. App. at 3a-4a. On November 14, 1997, the district court dismissed all claims raised in the complaint except those relating to respondents' decision to terminate petitioner's employment. The parties subsequently agreed to a joint stipulation of facts and filed cross-motions for summary judgment. *Id.*

On March 2, 1998, the district court granted respondents' motion for summary judgment on all remaining claims. *Id.* at 4a. In reaching its decision, the district court analyzed the particular facts of this case in the context of the *Matthews v. Eldridge*, 424 U.S. 319 (1976) balancing test and held that petitioner's due process rights were not violated. The district court concluded, *inter alia*, that respondents acted

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[2] On or about July 18, 1996, the charge of disorderly conduct was reduced, and Bolinger pled guilty to one charge of summary harassment in the Lancaster Court of Common Pleas. All other criminal charges pending against petitioner were *nolle prossed*. Pet. App. at 3a.

properly and that a pre-termination hearing was not required under the specific facts of this case since the value of holding such a hearing while criminal charges were still pending against petitioner was limited, the government interest in removing petitioner from his position as a law enforcement officer was substantial given the threat to public confidence were he returned to active duty while criminal charges were pending against him, and the probability of permanent and irreparable harm to petitioner was minimal due to the existence of the grievance arbitration procedure under the collective bargaining agreement. Pet. App. at 12a-17a.

3. In the Court of Appeals, petitioner, relying on *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), argued that terminating him from his position without a hearing violated his right to procedural due process under the Fourteenth Amendment. Respondents made three arguments in opposition to this claim. First, they argued that the existence of an adequate grievance arbitration procedure provided petitioner with sufficient procedural protections for purposes of the due process clause under the Fourteenth Amendment. Second, respondents, relying on the Supreme Court's recent decision in *Gilbert v. Homar*, 520 U.S. 924 (1997) and traditional principles of due process, maintained that a pre-termination hearing was not required since: (a) the value of holding a hearing while the criminal charges were still pending was negligible; and (b) the chance that petitioner would suffer a permanent and erroneous deprivation of his employment were slight given the significant opportunities available to him with which to challenge the termination decision under the collective bargaining agreement. Third, respondents argued that even if they had committed a technical violation of petitioner's rights by not holding a hearing, they were entitled to qualified immunity.

The Court of Appeals, in an unpublished opinion, rejected petitioner's argument and affirmed the decision of the district court, concluding that the "governmental interest in terminating [petitioner] outweighed any deprivation that he may have suffered." Pet. App. at 4a. In reaching its decision, the Court of Appeals relied heavily on this Court's recent decision in *Homar*, its own prior decision in *Dykes v. SEPTA*, 68 F.3d 1564 (3d Cir. 1995), *cert. denied*, 517 U.S. 1142 (1996), and traditional principles of due process as enunciated in *Matthews*. Pet. App. at 4a-5a. The Court of Appeals determined that under the unique facts of this case, petitioner's due process rights were not violated since: (1) "the government had a very strong interest in removing [petitioner] from active duty as a Capitol police officer until the criminal charges against him were resolved;" (2) petitioner's "interest in a pre-disciplinary hearing . . . was considerably weaker given that he had access to, and availed himself of, the grievance and arbitration procedures that eventually lead to his reinstatement;" (3) the risk of error was low since respondents terminated petitioner only "after confirming that he had been arrested and charged with criminal conduct;" and (4) the value of additional procedural safeguards was low given Pennsylvania's thirty day limitation on suspensions and the dilemma faced by respondents whereby they either had to reinstate petitioner to his position or terminate him. Pet. App. at 5a.

REASONS FOR DENYING THE WRIT

The Court Of Appeals Applied Well Settled Law About Which There Is No Circuit Conflict.

In *Gilbert v. Homar*, 520 U.S. 924 (1997), this Court held that a police officer who was arrested and criminally charged for drug related offenses was not entitled to notice and a hearing prior to being suspended without pay. The Court found that where an employee holds a position of "great public trust and high public visibility, such as police officers," the government has a significant interest in suspending the officer without pay and without the benefit of a prior hearing. *Id.* at 932. In reaching this decision, the Court specifically repudiated the view suggested in dicta by *Cleveland Bd. of Ed. v. Loudermill*, 470 U.S. 532 (1985), that pre-deprivation process is always required in the employment context. Rather, the Court reaffirmed its position that due process is a flexible concept which requires different procedural safeguards depending on the particular situation involved. *Homar*, 520 U.S. at 930-31.

In the present case, the Court of Appeals applied the Court's reasoning in *Homar* to find that petitioner's right to due process was not violated where he was suspended and then terminated from his position as a Capitol Police Officer after being arrested and criminally charged with disorderly conduct, resisting arrest, public drunkenness, and criminal mischief. Pet. App. at 4a-5a. The Court of Appeals' decision was based on the unique set of facts presented by this case, was unreported, and has no precedential value. Furthermore, although petitioner attempts to create a conflict among the circuits, no such conflict exists.

Petitioner argues that the Court of Appeals' decision conflicts with its own prior decision in *Gniotek v. City of Philadelphia*, 808 F.2d 241 (3d Cir. 1986), *cert. denied*, 481 U.S. 1050 (1987) (pre-deprivation hearing afforded police officers sufficient notice and an opportunity to be heard for purposes of due process under *Loudermill*), as well as the Fifth Circuit's decision in *Schaper v. City of Huntsville*, 813 F.2d 709, *rehearing denied*, 818 F.2d 865 (5th Cir. 1987) (pre-termination hearing not rendered invalid by biased decision-maker for purposes of due process so long as state provides adequate post-deprivation remedy), the Seventh Circuit's decision in *Chaney v. Suburban Bus Division of the Regional Transportation Authority*, 52 F.3d 623, 628 (7th Cir. 1995) (terminated bus driver would be entitled to prevail on claim that he was denied due process absent showing that employer actually provided pre-termination notice or that Union agreed to "forego additional pre-termination procedures in favor of the collective bargaining agreement's grievance and arbitration procedure"), and the Eleventh Circuit's decision in *Harrison v. Wille*, 132 F.3d 679 (11th Cir. 1998) (sheriff deputy's right to due process was not violated where he chose to exercise Fifth Amendment right instead of presenting evidence at pre-disciplinary conference). However, with the exception of *Harrison*, all these cases were decided prior to this Court's decision in *Homar*. Accordingly, to the extent that these decisions conflict with *Homar*, they are implicitly overruled and should not be viewed as creating a conflict between the circuits.[3]

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[3] *Harrison*, the only case cited to by petitioner which was decided after *Homar*, involved the question of whether a deputy sheriff's right to due process was violated where he chose to exercise his Fifth Amendment right against self-incrimination instead of presenting evidence at a predisciplinary conference. While the case did involve the termination of a law enforcement officer, any factual

Moreover, the cases cited to by petitioner are factually distinguishable from the present case and, even disregarding the intervening decision in *Homar*, their holdings would not create an actual conflict with the decision reached by the Court of Appeals in this case. The Court of Appeals relied on the following case specific facts in reaching its decision in the present case: (1) petitioner was a police officer who held a position of high public trust and high visibility; (2) the reason underlying the suspension and termination were the filing of criminal charges itself and not the merit of those charges; (3) petitioner's termination was not really permanent since he could, and in fact did, obtain reinstatement through the grievance and arbitration procedures under the collective bargaining agreement; (4) petitioner's termination did not really affect his status since he was already suspended without pay at the time of his termination; and (5) the value of holding a pre-deprivation hearing when the criminal charges were still pending was minimal where respondents were required to either terminate or reinstate petitioner after thirty days under Pennsylvania's civil service rules. Pet. App. at 4a-5a. Although *Gniotek*, *Schaper*, and *Harrison* all involved due process claims raised by terminated law enforcement officers, none of these cases involved the same factual or legal issues as in the present case.

Petitioner is critical of the Court of Appeals' reliance on the fact that he could obtain reinstatement with back pay pursuant to the grievance and arbitration procedures under the

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similarity with the present case ends there. Moreover, the decision simply did not address the question of whether petitioner's right to due process was violated by respondent's failure to provide him with a pre-termination hearing under the unusual circumstances presented by this case.

collective bargaining agreement in reaching its decision. Nevertheless, he does not cite to a single case which holds that this is not a legitimate factor to be considered under *Matthews v. Eldridge* and traditional principles of due process. Conversely, those courts which have considered the issue have found that the existence of post-deprivation grievance procedures is a factor to be considered in evaluating an employee's claim that he or she was denied due process and under certain circumstances may preclude such a claim. *See, e.g., Dykes v. SEPTA*, 68 F.3d 1564 (3d Cir. 1995), *cert. denied*, 517 U.S. 1142 (1996); *Cushing v. City of Chicago*, 3 F.3d 1156 (7th Cir. 1993); *Armstrong v. Meyers*, 964 F.2d 948 (9th Cir. 1992); *Naramanchi v. Bd. of Trustees of Conn. State Univ.*, 850 F.2d 70 (2d Cir. 1988); *Lewis v. Hillsborough Transit Auth.*, 726 F.2d 664 (11th Cir. 1983) (*per curiam*), *cert. denied*, 469 U.S. 822 (1984); *Ash v. Bd. of Educ. of Woodhaven School Dist.*, 699 F.2d 822 (6th Cir. 1983).

In the present case, the Court of Appeals applied the *Matthews* balancing test to weigh the competing interests of petitioner and his employer, and determined that the requirements of due process had been met under the specific facts of this case. Pet. App. at 4a-5a. In reaching this decision, the Court of Appeals relied heavily on this Court's recent decision in *Homar*. Pet. App. at 4a-5a. Although petitioner disagrees with this result has simply failed to show that the decision by the Court of Appeals in this case conflicts with the holdings of this Court in *Matthews* and *Homar,* or any of the circuit court decisions he cites.

CONCLUSION

For these reasons, respondents respectfully request that the Court deny the petition for writ of certiorari.

Respectfully submitted,

D. MICHAEL FISHER
Attorney General

HOWARD G. HOPKIRK*
Deputy Attorney General

CALVIN R. KOONS
Senior Deputy Attorney General

JOHN G. KNORR, III
Chief Deputy Attorney General
Chief , Appellate Litigation Section

Office of Attorney General
Appellate Litigation Section
15th Flr. Strawberry Square
Harrisburg, PA 17120
(717) 783-1478

DATE: June 7, 1999

***Counsel of Record for Respondents**